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February 16, 2021

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OF COUNSEL: RAYMOND SAYEG

VIA EMAIL

Christian Klein, Chairperson
Arlington Zoning Board of Appeals
50 Grove Street
Arlington, MA 02476

Re: 1165R Massachusetts Avenue, Arlington, MA (hereinafter referred to as the "Property") Comprehensive Permit

Dear Chairperson Klein:

In accordance with the direction of the Arlington Zoning Board of Appeals at the January 5, 2021 meeting (hereinafter referred to as the "Board" and the "Hearing", respectively), I am providing you with additional information relative to the above-referenced application for the Comprehensive Permit for the Property.

• *Shadow Study*

As I mentioned at the Hearing, my client caused a shadow study to be performed when Ms. Weber, a resident of Ryder Street, inquired as to the shadow impact of the proposed project on the Ryder Street properties.

The enclosed shadow study conclusively establishes that the project as proposed will not affect the Ryder Street residential properties.

• *Tree Plan*

Title V, Article 16 of the Arlington Town Bylaw, requires that the applicant submit a tree plan, so-called, identifying "protected trees". The Bylaw defines "protected trees" for purposes of a tree plan as "any existing healthy tree on private land with a diameter at breast height of 8" or greater, located in the setback area, which does not pose an immediate hazard to person or property or is not under imminent threat of disease or insect infestation." (emphasis supplied)

The setbacks for the Property, which is located in the Industrial district, are as follows:

- (a) front yard – 10';
- (b) side yards – 10'; and

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(c) rear yard – 10'.

Initially, the applicant believed the Norway maple trees on the edge of the property line were located on the Property. The site civil engineers have determined that the Norway maple trees are located on the abutting property. The applicant will not be removing them.

There is a 1" caliber Norway Maple on the Property in the setback which is not a "protected tree" and will be removed. There are three mulberry trees that are not located within the Property setback and, therefore, do not constitute "protected trees" under the Town Bylaw. These trees will be removed.

I emphasize, however, that there are substantial plantings proposed for the Property, which are detailed in the plans previously provided.

- *Ryder Street*

Mr. Tee, who resides on Ryder Street, has represented to the Board that the applicant has no ownership interest in Ryder Street, a private way. This representation is not correct.

Based upon the title examination performed and an analysis of the title documents and ALTA survey, a twenty-foot wide portion of Ryder Street is within Lot 9, which lot is owned by the applicant. The abutters on Ryder Street have the right to use Ryder Street for passage but it is clear that the applicant owns that portion of Ryder Street located within Lot 9.

- *Ryder Brook*

The applicant has appeared before the Arlington Conservation Commission and has received several Determinations of Applicability with respect to the Property, including the fact that a substantial portion of the Property is located in a historic mill complex, so-called, and that "Ryder Brook", which functions as a drainage ditch, is not a jurisdictional stream under the Massachusetts Wetlands Protection Act Regulations (310 CMR 10.00). The applicant's environmental consultant, Daniel Wells of Goddard Consulting, will review these determinations when the Board schedules the environmental issues for review.

Although not considered a resource area subject to State Wetland regulations, the ditch is considered a jurisdictional "stream" under the Arlington Wetlands Protection Bylaw. The applicant has requested a waiver from this local stream definition. The ditch is located in the center of the Property and its relocation is essential to the construction of the Project.

As detailed in the letter attached hereto prepared by Mr. Wells, the grant of the waiver and relocation of the ditch will not cause any adverse environmental effects to the Property, neighboring properties or the Mill Brook, and will, in fact, create a significant improvement over

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existing conditions by increasing the potential flood control. Further, the storm drainage system proposed will prevent untreated runoff into the Mill Brook and sewer system.

- ***Flood Zone***

I enclose a letter from Bohler Engineering, the site civil engineer for the project, which establishes that the project as built will not cause any increased flooding in Mill Brook and will have a beneficial impact on the overall Mill Brook watershed by decreasing the amount of runoff from the Property.

- ***Permeable Pavement and Sustainable Energy Alternatives***

As you are aware, the project as proposed will be increasing the permeable land area by 351%. Specifically, the total pervious area on the Property will be increased from 6.4% to 22.5%, a substantial increase.

With respect to the information provided by Ms. Stamps about the Town's vote at the Fall 2020 Town Meeting to preclude the use of fossil fuels on new projects, such as the home rule petition passed by the Town of Brookline, I have learned that the Massachusetts Attorney General has rejected the Brookline home rule petition, determining the proposed home rule petition was preempted by existing state law.

- ***Right of Way from the Property to Massachusetts Avenue***

One of the access points to the Property is a right of way from the Property to Massachusetts Avenue. The property owned by Attorney Anesse at 1171 Massachusetts Avenue was granted the right to use the right of way "for all purposes in and through the right of way adjoining the granted premises". This right of way is owned by the applicant. A right to utilize the right of way was granted to Attorney Anesse's predecessor in title by the applicant's predecessor in interest.

Attorney Anesse has suggested to the Board that the project will "overburden" the right of way. In *Stack v. D'Ambrosio*, 2018 WL 3751450, the Massachusetts land court stated in dicta that modern cases have rejected mere increased use of the right of way as the test for determining whether a right of way has been "overburdened". "A general right of way obtained by grant may be used for such purposes as are reasonably necessary to the full enjoyment of the premises . . . "Where the easement arises by grant and not by prescription, and is not limited in its scope by the terms of the grant, it is available for the reasonable uses to which the dominant estate may be devoted." This is the case here.

The applicant's traffic engineer, Nitsch Engineering, will address, among other things, the negligible increase in trips in and to the Property after its development. The applicant

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respectfully suggests that the proposed use of the Property will not constitute an overburdening of the right of way. In any event, that issue is not an issue the ZBA needs to address.

Other questions were raised as to blasting, deep excavation, cleaning of Ryder Street during construction and exterior lighting. There will be no deep excavation and/or blasting and instrument monitoring of neighboring properties/buildings is not required. The garages for the proposed project will not be constructed underground. The applicant will cause Ryder Street to be maintained during demolition and construction. Finally, the Property will have downwash-type lighting.

We will await the receipt of the peer review reports and will respond accordingly.

I thank you for your work on this matter.

Very truly yours,

Mary Winstanley O'Connor

MWO/ccg
Enclosures
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